6-3-1976

Roy Powell v. Commonwealth of Kentucky

Appellant's Brief 1976-SC-0363

APPELLANT'S BRIEF

SUPREME COURT OF KENTUCKY

FILE NO. 76-363

ROY POWELL — APPELLANT

VS. APPEAL FROM NICHOLAS CIRCUIT COURT
HON. JOHN P. LAIR, JUDGE

4155

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Brief For Appellant has been mailed postage prepaid, to Hon. John P. Lair, Judge, Nicholas Circuit Court, Nicholas County Courthouse, Carlisle, Kentucky 40311; Hon. G. L. Tucker, Commonwealth Attorney, 18th Judicial District, Carlisle, Kentucky 40311; and Hon. Robert F. Stephens, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 21 day of May, 1976.

J. Vincent Aprile II

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COMMONWEALTH OF KENTUCKY — APPELLEE

* * * * * * * * * *

MAY IT PLEASE THE COURT:

STATEMENT OF THE QUESTIONS PRESENTED

I.

WAS APPELLANT DENIED HIS RIGHT TO FULL AND EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES BECAUSE HIS COURT-APPOINTED ATTORNEY'S PROSECUTORIAL POSITION AS A CITY ATTORNEY CONSTITUTED A CONFLICT OF INTEREST?

II.

WAS THE TRIAL COURT'S APPOINTMENT OF A CITY PROSECUTOR TO REPRESENT APPELLANT AT HIS FELONY TRIAL CONTRARY TO PUBLIC POLICY NECESSITATING REVERSAL OF APPELLANT'S CONVICTION?

STATEMENT OF THE CASE

On September 22, 1975, appellant and his codefendant, Kenneth R. Fugate, were jointly indicted in Nicholas Circuit Court for the felony offense of theft by unlawful taking in violation of KRS 514.030 (Transcript of Record, hereinafter T.R., p. 1). The indictment alleged that appellant and his codefendant on or about July 16, 1975 "committed the crime of theft by unlawfully taking, a power-driven lawn mower worth more than One Hundred ($100.00) Dollars being the property of Grover H. Livingood" (T.R., p. 1). At his arraignment on October 1, 1975, appellant was represented by Harry Budden, a court-appointed attorney (T.R., p. 2). At that time appellant's codefendant, Kenneth R. Fugate, was represented by Richard Getty, another court-appointed counsel (T.R., p. 3).

However, on October 9, 1975, the date of trial, appellant was represented by Billy G. Hopkins, a court-appointed counsel, while Harry Budden, appellant's appointed counsel at arraignment, now was assigned counsel for appellant's codefendant, Kenneth R. Fugate (Transcript of Evidence, hereinafter T.E., pp. 1, 4). Mr. Hopkins remained appellant's only counsel throughout the trial.

Contrary to his plea, appellant on October 9, 1975 was convicted of unlawful theft by taking; the jury fixed appellant's punishment at confinement in the penitentiary for three years (T.R., p. 8; T.E., p. 159). Appellant's codefendant, Kenneth R. Fugate, was convicted of the same offense and sentenced to the same period of incarceration (T.R., p. 8; T.E., p. 159).

Judgment was entered on October 16, 1975 (T.R., pp. 13-14). Notice of Appeal was filed that same day (T.R., p. 17).

Grover H. Livingood, the prosecution's initial witness, testified that in July of 1975 he owned a farm in Nicholas County, Kentucky (T.E., pp. 44-45). According to the witness, he had purchased a new AMF lawn mower in the spring of that year for approximately seven hundred dollars (T.E., pp. 46-47). The mower had been used "eight or ten times" prior to the alleged theft (T.E., p. 47). Mr. Livingood explained that he kept this lawn mower in "a shed hooked on the barn" (T.E., p. 47). The front doors of the shed were kept open (T.E., p. 47). Although the shed was about "seventy five feet" from the Livingood home, a "security light" illuminated the shed "very well" and made it visible from the house (T.E., pp. 48, 55-56).

At approximately one o'clock in the morning on July 16, 1975, Mr. Livingood was awakened by his son, Grover C. Livingood (T.E., p. 49). Mr. Livingood "got up," dressed and went to the door (T.E., p. 49). There he observed people "loading" his lawn mower "on the back of a truck" (T.E., p. 49). The witness hollered for his son to join him; together they followed the departing truck (T.E., p. 49). As the truck backed up, Mr. Livingood "pulled" his car "right back in front of them" and observed that there were four people in the truck (T.E., p. 49). When the truck "pulled out fast," Mr. Livingood pursued. About a half mile from the Livingood home, the truck stopped and the driver stepped out with "his hands up" (T.E., p. 49).

At that point the driver of the truck said, "You done caught us with your mower. I'll take your mower back" (T.E., pp. 49-50). Mr. Livingood answered, "all right" (T.E., p. 50).

After both vehicles turned around, Mr. Livingood followed the truck back to the shed (T.E., p. 50). The driver exited the truck and opened the tailgate. When the driver experienced "some problem opening the tailgate," he asked

"a couple of the boys to get out and help him with the mower" (T.E., p. 50). After the driver raised his voice, two men exited the truck and helped the driver lift the mower (T.E., p. 50). After putting the mower back in the shed, they "got in the truck." The driver stepped from the truck and said "he wouldn't be back anymore" (T.E., p. 50). Mr. Livingood replied, "Don't come back" (T.E., p. 50).

In court Mr. Livingood identified appellant as the driver of the truck and Kenneth Fugate, the codefendant, as one of the men who took the lawn mower (T.E., p. 51).

Mr. Livingood admitted that on the night of the alleged offense he did not know the names of the men who participated in the taking of his lawn mower (T.E., pp. 64, 76). Furthermore, the witness had never seen any of the four men before (T.E., p. 76).

The witness recalled that the men were in a green 1960 Chevrolet truck with "a camper on it" (T.E., p. 52). On redirect examination, Mr. Livingood testified that he saw this same truck again at a time subsequent to the alleged offense but he did not remember where or when (T.E., pp. 79-80).

Grover C. Livingood, the twenty-four-year old son of Grover H. Livingood, related an account of the incident which substantially corroborated his father's testimony (T.E., pp. 86-99). The son remembered that at approximately one a.m. on July 16, 1975 he returned home from a movie, undressed and went to bed (T.E., p. 88). Shortly after he retired for the night, the son heard "a truck coming up the road" and then stopping (T.E., p. 88). The witness "looked out the window" and observed "three guys" getting out of the truck (T.E., p. 88). The truck had "stopped right by the driveway." While the

truck "went up the road and turned back around," the three men proceeded to "get the lawn mower" (T.E., pp. 89-90). At that point the witness awakened his father and apprised him of the situation (T.E., p. 90). The remainder of the son's testimony substantially parallels his father's account of the incident.

Grover C. Livingood contended that while the men were unloading the lawn mower he recognized one of them as appellant (T.E., p. 95). Although the witness claimed that he had known appellant prior to the incident, during cross-examination he acknowledged that subsequent to the alleged theft law enforcement officers informed him that the man was appellant (T.E., pp. 95, 101-102, 105-106, 107-108).

The witness recalled that on the night in question the four men had been in a green chevrolet pick up truck (T.E., p. 92). He added that he later saw that same truck at Mr. Shepherd's place in Sharpsburg (T.E., p. 98).

The final prosecution witness, Walter (Bill) Shepherd, testified that at nine o'clock at night about July 16, 1975 appellant and two men came to his house in Sharpsburg to borrow his truck to use in moving some furniture (T.E., pp. 130-131). According to the witness, appellant kept the truck overnight and returned it the following morning (T.E., p. 131). The same two men were with appellant when he returned the truck (T.E., p. 132).

Mr. Shepherd described his truck as a 1967 green Chevrolet pick up with a camper on it (T.E., p. 130).

At the conclusion of the prosecution's case, appellant's defense counsel moved for a directed verdict, but his motion was overruled (T.E., p. 136). Immediately thereafter, appellant's counsel made the following request:

> I'd like to have a recess prior to going into the defense's testimony, five minute recess or something (T.E., pp. 136-137).

After a five-minute recess, appellant's defense counsel announced, "My client has no testimony to offer, so I have no opening statement" (T.E., p. 137).

In response to this statement, the trial judge made the following comments:

> You have no opening statement. All right. Let the record show that counsel for Roy Powell had reserved at the start of the trial his right to make an opening statement and at the conclusion of the Commonwealth's evidence and after the Commonwealth closed its case and after counsultation [sic] with client, counsel for the defendant Roy Powell stateed [sic] to the Court that he had no desire to make an opening statement nor did the defendant have any evidence to offer (T.E., pp. 137-138).

No additional evidence was offered in the trial. After closing arguments, the case was submitted to the jury (T.E., pp. 156-157).

ARGUMENTS

I.

THE APPELLANT WAS DENIED HIS RIGHT TO FULL AND EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES BECAUSE HIS COURT-APPOINTED ATTORNEY'S PROSECUTORIAL POSITION AS A CITY ATTORNEY CONSTITUTED A CONFLICT OF INTEREST.

Appellant Roy Powell, an indigent, was convicted of the felony offense of theft by taking after a jury trial at which he was represented by appointed counsel, Billy G. Hopkins, who, at the time of the appointment and trial was the City Attorney of Carlisle, Kentucky.[1] Carlisle is the county seat of Nicholas County, the county in which appellant's trial was conducted.

The city of Carlisle has a population of approximately one thousand six hundred and forty-six (1,646) and is a city of the fourth class.[2] KRS 81.010 (see App., p. 2).

The city prosecutor of a city of the fourth class "shall prosecute all pleas of the Commonwealth and all warrants or proceedings instituted for violation of the ordinances or municipal regulations of the city in the police court." KRS 69.560. Furthermore, "[i]f an appeal is taken from the judgment of a police court of a city of the fourth class under the penal

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[1]Although the record does not reflect that Billy G. Hopkins, appellant's appointed counsel, was City Attorney of Carlisle at the time he represented appellant, this Court may judicially note this fact. The identity of a public official is a proper subject for judicial notice. Courts will take judicial notice of the identity of the incumbents of public offices. Wharton's Criminal Evidence (13th Ed. 1972), § 65. Thus, this Court should take judicial notice that Billy G. Hopkins served as city attorney for the City of Carlisle, Kentucky at the time he acted as counsel for appellant (see Appendix, hereinafter designated App., p. 1).

[2]Judicial notice will be taken of compilations of statistics accepted as accurate and of census returns. Wharton's Criminal Evidence (13th Ed. 1972), § 74. Judicial notice will also be taken of the population of the state as well as the political subdivision of the state. Id., at § 56, citing Held v. Commonwealth, 183 Ky. 309, 208 S.W. 772 (1919).

laws of Kentucky the city attorney shall represent the Commonwealth in any court to which the case may be appealed." KRS 69.570.

Appellant submits that he was denied his right to full and effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, because his court-appointed attorney, Billy G. Hopkins, had a conflict of interest stemming from his prosecutorial position as the city attorney of Carlisle, Kentucky.

The right to the effective assistance of counsel is a fundamental right and entitles the person represented to the undivided loyalty of counsel. Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942). Effectiveness, however, is not a matter of professional competence alone. Castillo v. Estelle, 504 F.2d 1243, 1245 (5th Cir. 1974).

In Porter v. United States, 298 F.2d 461, 463 (5th Cir. 1962), the court explained:

> The Constitution assures a defendant effective representation by counsel whether the attorney is one of his choosing or court-appointed. Such representation is lacking, however, if counsel, unknown to the accused and without his knowledgeable assent, is in a duplicitious position where his full talents - as a vigorous advocate having the single aim of acquittal by all means fair and honorable - are hobbled or fettered or restrained by commitments to others.

In Goodson v. Peyton, 351 F.2d 905 (4th Cir. 1965), the court examined the contention made by a state prisoner that his Virginia conviction was constitutionally defective because his court-appointed lawyer was the Commonwealth's Attorney for a neighboring county. The Goodson court evaluated the "potential conflicts of interest" inherent in the appointment of public prosecutors as attorneys for indigent defendants:

> The federal constitution guarantees to persons accused of crime in state courts the right to representation by a lawyer. The constitutionally protected right is not satisfied by formalsims [sic]; the right is to effective representation. That is not to say that every indigent defendant is entitled to the services of the most competent lawyer practicing in the area or to one whose judgment as exercised during the course of his representation may be said to have been superior when subjected to subsequent scrutiny. It does mean that the indigent defendant is entitled to a lawyer who can give to his client undivided loyalty and faithful service. A lawyer forced, or attempting, to serve masters with conflicting interests cannot give to either the loyalty each deserves. Id., at 907-908. (emphasis added).

Analyzing the intrinsic conflict of interest created when a part-time city attorney is appointed to represent a defendant in a state-prosecuted action, the court in Karlin v. State, 47 Wis. 2d 452, 177 N.W.2d 318, 321 (1970), emphasized "the potentiality for a serious conflict when the legal representative of one subdivision of a state defends a person charged with a crime by another subdivision of the state." [3]

By juxtaposing the roles of the criminal defense counsel and the city prosecutor, the inherent conflict of interest becomes apparent.

City police officers are the principal source of witnesses relied upon by a city attorney in prosecutions for

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[3] In Waller v. Florida, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435 (1970), the Supreme Court explained that, in terms of the constitutional issue of double jeopardy, a municipality created by state law is merely a subdivision of the state and that, as a consequence, one could not be prosecuted for the same act under a city ordinance and a state statute. The Waller opinion concluded that a city is not a separate sovereign entity as distinguished from the state, but that the city, county, and other territorial subdivisions of the state are merely subordinate governmental instrumentalities created by the state to assist in carrying out state governmental functions. See Karlin v. State, supra, 177 N.W. 2d at 321.

violations of city ordinances. If these same police officers are witnesses in a case in which a city attorney is acting as defense counsel, he might be reluctant to engage in an exhaustive or abrasive cross-examination of such officers even though such might well be required. A city attorney in his capacity as defense counsel might also be influenced to dilute his criticism of local police conduct even though the situation calls for stressing the impropriety of police activity. People v. Rhodes, 12 Cal.3d 180, 115 Cal.Rptr. 235, 524 P.2d 363, 365 (1974).

In Karlin v. State, supra, 177 N.W.2d at 321, the Wisconsin Supreme Court explained the practical difficulties confronting a city attorney under similar circumstances: "the temptation might well arise to be not too hard on a police witness who is against your client today but would be the star witness for your prosecution tomorrow."

In the situation confronting a city attorney acting as a defense counsel there inevitably will arise a struggle between, on the one hand, counsel's obligation to represent his client to the best of his ability and, on the other hand, a public prosecutor's natural inclination not to anger the very individuals whose assistance he relies upon in carrying out his prosecutorial responsibilities. Such a conflict of interest would operate to deprive a criminal defendant of the undivided loyalty of defense counsel to which he is entitled. People v. Rhodes, supra, 524 P.2d at 366.

Even when the law enforcement agents involved in the trial are not city police officers, the city prosecutor/defense counsel will still encounter a conflict of interest. As the Supreme Court of California noted in the Rhodes decision:

> This same potentially debilitating conflict of interest is operative when, as in the case at bench, the only police officers called as witnesses are members of neighboring law enforcement agencies. Neighboring and overlapping law enforcement agencies have close working relationships, and resentment engendered by a city attorney within the membership of such agencies would have an adverse effect on the relationship of the city attorney with members of his local police department. In addition, as a public prosecutor a city attorney is granted courtesies and assistance by the police departments and prosecuting authorities of the county and other municipalities. It is possible that a vigorous and determined representation of a criminal defendant might result in the withdrawal or weakening of this helpful cooperation and, therefore, a city attorney might be tempted to temper his advocacy accordingly. Id., at 366.

Faced with these competing considerations, a city prosecutor, acting as appointed defense counsel, would not be able to give his undivided loyalty to his indigent client.

Addressing the conflict of interest generated by the appointment of a city prosecutor as a trial defense counsel, the court in Goodson v. Peyton, supra, at 908, observed:

> Loyal and effective respresentation [sic] of a person charged with crime in a state court may require defense counsel to question the constitutionality of state laws or to seek restrictive interpretations of them. He may find it necessary to attack the practices and conduct of law enforcement officials, including those of the prosecutor. In either of these events, if defense counsel is a Commonwealth's Attorney, he may find himself required as defense counsel to attack laws, interpretations, practices and conduct which, as Commonwealth's Attorney, he is bound to defend and uphold in an adjoining county. He may be loath to take a position as defense counsel which he would find embarrassing as Commonwealth's Attorney.

Although the Goodson court cast its discussion in terms of a Commonwealth Attorney, the position of city attorney could be substituted in the excerpt with no injury to the logic of the analysis. Certainly, "if defense counsel is" a city attorney, "he may find himself required as defense counsel to attack laws, interpretations, practices and conduct which," as a city prosecutor, "he is bound to defend and uphold" within the city limits of the county where his client is being prosecuted. Accordingly, the city prosecutor/defense counsel "may be loath to take a position as defense counsel which he would find embarrassing as" city attorney.

If a defendant in a criminal case did not seek to be represented by a public prosecutor, but instead has a prosecutor appointed as his counsel, he "may be reluctant to confide in a lawyer whom he knows to be a" public prosecutor. Goodson v. Peyton, supra, at 908-909. Even in an uncomplicated case, "it would be difficult to find a basis for perfect assurance that the full and open disclosure which the attorney-client relation requires might not involve information about other crimes, information which the defendant would wish to remain undisclosed to any prosecutor." Id., at 909.

In view of the plethora of conflicting and competing considerations present when a city prosecutor is appointed as defense counsel in a felony case, it is undeniable that such an appointment inherently constitutes a conflict of interest which debilitates the integrity of the constitutionally guaranteed right to counsel.

Recognizing this reality, the Goodson court announced the following per se rule to govern the issue at bar:

> Since conflicts of interest are so likely, however, and since in most cases in which they are not apparent on the surface, one cannot know with assurance that there were no subliminal or concealed conflicts which may have affected the outcome of the trial, we think it may well be that the only workable rule of the future will be a per se one, in which it would be presumed that one involuntarily represented by a public prosecutor in a criminal trial has not had the fair trial to which he is constitutionally entitled. Goodson v. Peyton, supra, at 909-910.

Such a per se approach has been endorsed by other jurisdictions. In California, there is "a judicially declared rule of criminal procedure" that "a city attorney with prosecutorial responsibilities may not defend or assist in the defense of persons accused of crime." People v. Rhodes, supra, 524 P.2d at 367-368.

The nature and duties of a public prosecutor are recognized as inherently incompatible with the obligations of a criminal defense counsel. For example, in People v. Cross, 30 Ill. App.3d 199, 331 N.E.2d 643, 645 (1975), the court held that an attorney's representation of the defendant, on the one hand, and his affiliation with the Illinois Attorney General's office as "a special assistant attorney general for the handling of inheritance tax matters," on the other, "constituted a per se conflict of interest." See also State v. Crockett, Mo., 419 S.W.2d 22 (1967).

In MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), the court-appointed counsel for the indigent defendant at the time of the accused's state trial, had on file an application for employment with the office of the district attorney. This was held to constitute a "conflict of interest." Id., at 600.

The highest court of Wisconsin has announced "an attorney who is also a municipal attorney should avoid representing a defendant who is charged in a state prosecution." Karlin v. State, supra, 177 N.W.2d at 322.

When conflicting interests are present, and a mere possibility of prejudice exists, a denial of the right to a full and effective assistance of counsel must be found and reversal is required. "It is not necessary that [a defendant] . . .delineate the precise manner in which he has been harmed by the conflict of interest. The possibility of harm is sufficient to render his conviction invalid." Sawyer v. Brough, 358 F.2d 70, 73 (5th Cir. 1965), following Glasser v. United States, supra. All that is required for reversal is that representation was not as effective as it might otherwise have been; "adequacy of counsel" is not the measure. United States v. Gougis, 374 F. 2d 758 (7th Cir. 1967); Craig v. United States, 217 F.2d 355 (6th Cir. 1954).

When there is a conflict of interest, the prejudice may be subtle, even unconscious. It may elude detection on review. A reviewing court deals with a cold record, capable, perhaps, of exposing gross instances of incompetence but often giving no clue to the erosion of zeal which may ensue from divided loyalty. Accordingly, where the conflict is real, as it is here, a denial of the right to effective representation exists, without a showing of specific prejudice. Castillo v. Estelle, supra, at 1245.

Assuming arguendo that this Court rejects a per se rule of conflict of interest in cases involving the appointment of a city prosecutor, appellant submits that the facts and circumstances of his case require a finding of conflict of interest. At his arraignment on October 1, 1975, appellant

was represented by Harry Budden, a court-appointed attorney (T.R., p. 2). At that time appellant's codefendant, Kenneth R. Fugate, was represented by Richard Getty, another court-appointed counsel (T.R., p. 3).

However, on October 9, 1975, the date of trial, appellant was represented by Billy G. Hopkins, a court-appointed counsel who was then the attorney for the city of Carlisle, while Harry Budden, appellant's appointed counsel at arraignment, now was assigned counsel for appellant's codefendant, Kenneth R. Fugate (T.E., pp. 1, 4). Mr. Hopkins, the city attorney, remained appellant's only counsel throughout the trial.

Significantly, the record contains nothing to indicate that appellant agreed to allow his initial court-appointed counsel, Harry Budden, to withdraw. But of more import is the fact that the record does not contain any indication that appellant was advised by the trial judge that Billy G. Hopkins, the second attorney appointed as his defense counsel, was the city attorney of Carlisle -- the county seat of Nicholas County, the situs of appellant's trial.

In Karlin v. State, supra, the Supreme Court of Wisconsin acknowledged that "[u]nder some circumstances and in some counties where lawyers are few, it may be impractical for a municipal attorney to avoid what is properly regarded as the duty of the bar to represent criminal defendants." Id., 177 N.W.2d at 322. However, the Karlin court described the type of advice and inquiry to be made by the trial court:

> In such cases, however, the defendant should be fully apprised of the fact that his appointed counsel is a municipal attorney whose daily duties require him to operate on a close and cooperative basis with police authorities, and the trial judge should avoid making such appointments even when the choice of attorneys may be limited where extensive

> efforts to impeach police officers or to question police procedures are potentially significant in the case. It would therefore be only in the unusual and the very simple case where we would consider the appointment of a municipal attorney appropriate, recognizing, however, that the defendant, once being fully apprised of the potentiality of conflict, may nevertheless proceed to be so represented. Such an election, however, would constitute a waiver to the ineffectiveness of counsel on the grounds of a conflict of interest. Id., 177 N.W.2d at 322.

The waiver of a fundamental constitutional right is not ordinarily presumed, but must be shown through a development of the facts and circumstances surrounding each case. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Since the present record provides no basis for finding that appellant relinquished a known right, it must be presumed that appellant did not knowingly, intelligently, and voluntarily accede to the appointment of a city prosecutor to serve as his defense counsel. The absence of any evidence in the record indicating appellant was advised of the conflict renders the case at bar readily distinguishable from Cole v. Commonwealth, Ky., 441 S.W.2d 160 (1969). In Cole, this Court reasoned that "Cole knew at the time Fuqua was appointed. . .that he [Fuqua] was a prosecutor." Id., at 162.

An appellate court must conclude that a defendant did not waive his attorney's conflict of interest, when "the evidence is insufficient to show a full disclosure of the facts" of the attorney's conflict and "to show express consent" by the defendant "to representation by that attorney." People v. Cross, supra, 331 N.E.2d at 645.

A perusal of the record in the case sub judice reveals that the defense presented by appellant's appointed counsel was

subdued and restrained. The transcript of record contains but one pretrial motion -- a motion to suppress (T.R., pp. 6-7). Although the caption of the motion bears the names of appellant and his codefendant and the motion is signed by both defense attorneys, the substance of the motion is a request that all evidence pertaining to the identification of appellant's codefendant, Kenneth Fugate, by the prosecution witnesses be suppressed because a single-photograph identification procedure was impermissively suggestive and created a substantial likelihood of irreparable misidentification (T.R., pp. 6-7). Significantly no comparable motion was filed on behalf of appellant.

Furthermore, appellant's counsel, after a five-minute recess following the close of the prosecution's evidence, elected to present no witnesses on behalf of the defense (T.E., pp. 136-137).

During his closing argument, appellant's counsel questioned the identification of appellant by the Livingoods. He noted that Mr. Livingood's son said he knew appellant before the events in question. Appellant's counsel then stated:

> I asked him on cross examination how did they get the name of Roy Powell. How of the four people, did they get his name. He didn't know anything. I maintain that the law enforcement people gave him all the evidence and they said this is Roy Powell here and Grover C.---Grover H. Livingood signed the warrant (T.E., p. 145; emphasis added).

Appellant's counsel then inquired of the jury:

> Just think through that motion and if you were charged with a crime and the only evidence against you was a case of identification at one o'clock in the morning and three days lapsed before a warrant was issued against you, but during that time law enforcement officers were talking to you, all of this went on, would you want to be convicted on that kind of identification (T.E., p. 145; emphasis added)?

Later in his argument, appellant's counsel again emphasized the strangeness of a three day delay between the incident in question and the swearing out of a warrant by Mr. Livingood:

> But during those three days, father and son are together talking, talked with the law enforcement people, investigations were made, all of this goes on. Suddenly, the warrants were issued (T.E., p. 147; emphasis added).

It is apparent that the core of the defense presented by appellant's counsel in his closing argument was that any identification of appellant was highly suspect and probably the result of "coaching" by law enforcement agents. Nevertheless, appellant's counsel did not present evidence on this defense, either in chambers or before the jury. Perhaps, since the key witnesses for such a defense would be the state troopers who investigated the alleged crime, appellant's counsel, the city attorney for Carlisle, was reluctant to issue subpoenas for these law enforcement agents and to challenge their investigating techniques. Such a defense, based primarily on defense counsel's comments in closing argument, fuels appellant's contention that he was denied his constitutional right to full and effective assistance of counsel because his court-appointed attorney's prosecutorial position as a city attorney constituted a conflict of interest.

For the reasons delineated above, appellant's conviction must be reversed.

II.

THE TRIAL COURT'S APPOINTMENT OF A CITY PROSECUTOR TO REPRESENT APPELLANT AT HIS FELONY TRIAL WAS CONTRARY TO PUBLIC POLICY NECESSITATING REVERSAL OF APPELLANT'S CONVICTION.

In People v. Rhodes, 12 Cal. 3d 180, 115 Cal.Rptr. 235, 524 P.2d 363, 365 (1974), the Supreme Court of California examined the legal ramifications of the appointment of a city attorney to represent a criminal defendant and observed:

> [T]he vital interests of criminal defendants and the criminal justice system are adversely affected when public prosecutors are permitted to defend or assist in the defense of persons accused of crime. Id., 524 P.2d at 365.

Inherent in the appointment of a public prosecutor to represent an indigent defendant "are considerations of a practical nature which have a potentially debilitating effect on both the quality of the legal assistance rendered by a city attorney to criminal defendants and the ability of a city attorney to properly discharge his prosecutorial responsibilities." People v. Rhodes, supra, 524 P.2d at 365.

Another aspect of the policy proscription against the assignment of prosecutors to serve as defense attorneys is premised upon "the public's interest in the successful prosecution of those guilty of a crime." People v. Rhodes, supra, 524 P.2d at 366. Amplifying this principle, the Rhodes court explained:

> If, because of a vigorous representation of a criminal defendant by a public prosecutor there results a weakening of assistance provided by local and neighboring law enforcement agencies, the prosecutor's ability to enforce those criminal laws falling within the scope of his responsibilities as a city attorney would be severely undermined. Indeed, this was the principal consideration which led the

> Committee on Professional Ethics of the American Bar Association to conclude that a public prosecutor in one state may not properly defend a person accused of a crime in a sister state, even though the case was to be tried in the latter state and the law of neither state prohibited the public prosecutor from engaging in such criminal defense work. (ABA Op. 30 (Mar.2, 1931).) Thus, even if defendants' interests are unaffected, the proper functioning of the criminal justice system may be endangered where public prosecutors engage in the private representation of criminal defendants. Id., 524 P.2d at 366.

Aside from the detrimental effects engendered by the conflicting loyalties of defense counsel and public prosecutors, other compelling public policy considerations render it inappropriate for a city attorney with prosecutorial responsibilities to represent criminal defendants. The Rhodes court advanced this explanation:

> It is essential that the public have absolute confidence in the integrity and impartiality of our system of criminal justice. This requires that public officials not only in fact properly discharge their responsibilities but also that such officials avoid, as much as is possible, the appearance of impropriety. People v. Rhodes, supra, 524 P.2d at 367.

As early as 1931, ABA Opinion 49 (Dec. 12, 1931) advised, "If the [l]egal profession is to occupy the position in public esteem which will enable it to be of the greatest usefulness, it must avoid not only all evil but likewise avoid the appearance of evil." Echoing this same sentiment, the Supreme Court of the United States in the case In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955), emphatically noted, "Justice must satisfy the appearance of justice."

In a series of rulings, the American Bar Association Ethics Committee concluded that the legal system would be adversely

affected if public prosecutors accepted employment as criminal defense counsel. See ABA Opinions 16 (June 11, 1929), 30 (March 2, 1931), 34 (March 3, 1931), 142 (May 9, 1935) and 186 (July 24, 1938). The bedrock of these decisions is the real concern that the public might infer that "a public prosecutor who was representing criminal defendants would use his influence and position to extract favorable treatment for such defendants in order to further the success of his private professional career." People v. Rhodes, supra, 524 P.2d at 367. "Even the appearance of such impropriety could operate to weaken the public's confidence in the system of criminal justice." Id.

After concluding that "the nature and duties of a public prosecutor are inherently incompatible with the obligations of a criminal defense counsel," the Supreme Court of California offered this final summary of its ratiocination:

> When a city attorney represents criminal defendants there arises the possibility that either the defendant's interest in a vigorous and determined advocacy or the public's interest in the smooth functioning of the criminal justice system will suffer. In addition, public confidence in the integrity of the criminal justice system could be adversely affected by the appearance of impropriety incident to a public prosecutor's private representation of a criminal defendant. Thus, the interests of both criminal defendants and the judicial system require that city attorneys who have prosecutorial responsibilities not represent criminal defendants. People v. Rhodes, supra, 524 P.2d at 367.

Kentucky has long recognized a constitutional abhorrence of incompatible offices. Section 165 of the Constitution of Kentucky, entitled "Incompatible Offices," prohibits the holding of incompatible offices within the state.

Additionally, this Court has acknowledged "a common-law or functional incompatability, which is declared by courts without the aid of specific or statutory prohibition when the two offices are inherently inconsistent or repugnant, or when the occupancy of the two offices is detrimental to the public interest." Adams v. Commonwealth, Ky., 268 S.W.2d 930, 931 (1954).

Since it is beyond dispute that the positions of city attorney and appointed defense counsel are "inherently inconsistent or repugnant" and that the joint occupancy of those positions by one man "is detrimental to the public interest," this Court must "judicially declare" a rule of criminal procedure that "a city attorney with prosecutorial responsibilities may not defend or assist in the defense of persons accused of crime." People v. Rhodes, supra, 524 P.2d at 367-368.

Since it was improper to appoint Carlisle's city attorney to represent appellant, the judgment of conviction must be reversed.

CONCLUSION

For the foregoing reasons, we respectfully request that the judgment of the lower court be reversed.

Respectfully submitted,

JACK EMORY FARLEY
PUBLIC DEFENDER
COMMONWEALTH OF KENTUCKY
625 LEAWOOD DRIVE
FRANKFORT, KENTUCKY 40601

J. Vincent Aprile II

J. VINCENT APRILE II
ASSISTANT PUBLIC DEFENDER
625 LEAWOOD DRIVE
FRANKFORT, KENTUCKY 40601

APPENDIX

City of Carlisle, Kentucky

CITY HALL BUILDING - CHESTNUT STREET

WILLIAM POWER
MAYOR

RAYMOND HALL
CITY JUDGE

BILLY HOPKINS
ATTORNEY

JOYCE McINTYRE
CLERK-TREASURER

GAYLE VANLANDINGHAM
CITY SERVICE

OLIVER K. VICE
WATERWORKS

ROBERT FAUL
WATER

CLARENCE CORD
SEWER

MANUEL CRAWFORD
GAS, STREETS & ALLEYS

CHARLES FAY
FIRE, BUILDING & LIGHTING

JULIAN GREEN
SUPPLIES & TRASH

CALVIN WILLS
FINANCE & OFFICE

May 13, 1976

Vincint Apriles
Office of Public Defender
Commonwealth of Kentucky
625 Leawood
Frankfort, Ky. 40601

Dear Sir:

This is to certify that Billy Hopkins was sworn in as City Attorney in January of 1974 at the regular council meeting and that he was Attorney for the City of Carlisle, Kentucky, October 9, 1975.

Yours truly,
Joyce McIntyre
Joyce McIntyre,
City Clerk
Carlisle, Ky. 40311

Attest:
Beulah M. Hughes
Clerk Nicholas Co. Ct.

JULIAN M. CARROLL
GOVERNOR

LARRY G. TOWNSEND
COMMISSIONER

COMMONWEALTH OF KENTUCKY
Department of Commerce
FRANKFORT 40601

May 13, 1976

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MAY 17 1976
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OFFICE OF
PUBLIC DEFENDER

Mr. J. Vincent Aprile, Attorney
Office of the Public Defender
625 Leawood Drive
Frankfort, Kentucky 40601

Dear Mr. Aprile:

Pursuant to a telephone conversation with one of your staff you requested the population figures for Nicholas County and Carlisle, Kentucky. The latest information available for counties are 1974 provisional estimates. The provisional figure for Nicholas County is 6,400. The latest figures available for cities are 1973 estimates, Carlisle had a population of 1,646.

If any further information is needed, please feel free to contact me.

Sincerely,

William C. Turner

William C. Turner
Development Representative
Division of Research and Planning

WCT/cp